No. 658

Office - Supreme Court, U. S.
FILED
NOV 7 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1944

ABRAHAM JESKOWITZ,

Petitioner,

against

LEONARD H. CARTER, Trustee in Bankruptcy of UNION FABRICS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND MOTION TO DISPENSE WITH PRINTING AND SERVICE OF THE RECORD

ARCHIBALD PALMER,
Attorney for Petitioner.

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Statement of Facts 2

Reasons Relied On for the Allowance of the Writ 7

Specifications of Error to be Advanced 9

Summary of Argument 10

Argument 11

POINT A—There is a conflict of authority within the Circuit Court of Appeals for the Second Circuit on the question of when a trustee may rely on a presumption of continued possession resulting in the suggestion by the Circuit Court of Appeals for the Second Circuit, in its recent decisions, that this question be reviewed and finally determined by the Supreme Court of the United States 11

POINT B—There is a conflict of authority on the question of presumption of continued possession among several circuits on the question of law involved in the case at bar, and there should be a unanimity of opinion among the various circuits with regard to this question 17

POINT C—The Trustee did not offer any proof to show that petitioner had, at the date of the turnover order, any property of the bankrupt, although the law requires that the Trustee establish all the elements of a turnover proceeding by clear and convincing proof 20

CONCLUSION 21

Motion to Dispense with Printing and Service of the Record 23

CASES CITED

PAGE

Boyd v. Glucklich, 116 F. 131 21

Danish v. Sofranski, 93 F. (2d) 424 ..... 8, 15, 16

Epstein v. Steinfeld, 210 Fed. 236 21

H. Magen Co., In re, 10 F. (2d) 91 18

Marin v. Ellis, 15 F. (2d) 321 ..... 8, 18

J. L. Marks & Co., In re, 85 F. (2d) 8, 18

Oriel v. Russell, 278 U. S. 358 ..... 17, 20, 21

Pinsky-Lapin & Co., In re, 98 F. (2d) 776 ..... 8, 16, 18

Robbins v. Gottbetter, 134 F. (2d) 843 ..... 8, 14, 19

Samel et al. v. Dodd, 142 Fed. 68 ..... 8, 19

Schoenberg, In re, 70 F. (2d) 321 ..... 8, 16

Seligson v. Goldsmith, 128 F. (2d) 977 ..... 8, 9, 15, 17, 19

Steinreich Associates, Inc., 83 F. (2d) 254 18

STATUTE CITED

Bankruptcy Act:

Section 21-L 11

Supreme Court of the United States

OCTOBER TERM 1944

ABRAHAM JESKOWITZ,
Petitioner,

against

LEONARD H. CARTER, Trustee in Bankruptcy of UNION FABRICS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of ABRAHAM JESKOWITZ prays that a return of certiorari issue to review the order and decree of the Circuit Court of Appeals for the Second Circuit entered on the 8th day of August, 1944 (R. 85a, 86a) affirming an order of the District Court of the United States for the Southern District of New York dated the 6th day of May, 1943 (R. 5a). The order of the District Court affirmed the order of the Referee in Bankruptcy dated February 23, 1943 (R. 20a).

Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 77a) is reported at 144 Fed. (2d) 39. An opinion was written by Circuit Judge Augustus N. Hand and a concurring opinion was written by Circuit Judge Jerome N. Frank.

The District Judge rendered an opinion in affirming the order of the Referee in Bankruptcy (R. 7a).

The Referee in granting the application of the Trustee handed down a written decision (R. 25a).

Jurisdiction

The decree of the Circuit Court of Appeals was entered on the 8th day of October, 1944 (R. 85a).

The jurisdiction of the Court is under Section 24 (c) of the Bankruptcy and under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement of Facts

The petitioner is the president of the Union Fabrics, Inc. On the 20th day of December, 1939, an involuntary petition in bankruptcy was filed against the Union Fabrics, Inc. in the office of the Clerk of the United States District Court for the Southern District of New York. A turnover proceeding was instituted by the Trustee in Bankruptcy on or about October 25, 1940, charging the petitioner herein, as president and sole stockholder of Union Fabrics, Inc., with having failed to account for merchandise valued at $69,921.24, the proceeds of a ring amounting to $875 and the following books and papers alleged to have been under his control: journal for the year 1938; general ledger for the year 1937; inventory sheets for the years 1937, 1938 and 1939, and all purchase invoices for the year 1937. Abraham Jeskowitz appeared and interposed an answer denying the material allegations of the petition. Hearings were commenced on January 27, 1941, and continued until October 25, 1941, by which time there had been adduced 315 pages of testimony. Abraham Jeskowitz, who had no legal training, because of lack of funds had no alternative but to conduct his own defense to the proceedings up to

September 24, 1941, when he was able to retain Chester A. Lessler, Esq., to conclude the hearing on the original petition. On October 25, 1941, an amended petition was filed by the Trustee directing Abraham Jeskowitz to show cause why he sould not turn over to the Trustee 187,363⅛ yards of silks and other textiles, the proceeds of the ring, and the books and records as referred to in the original petition. The amended petition was predicated upon the theory that the Union Fabrics, Inc. had on hand on January 1, 1939, merchandise of the cost or value of $194,785.05 and upon the further theory that the merchandise was sold at a price not less than cost during the period between January 1, 1939, and September 28, 1939 (R. 31a). Additional testimony was taken based upon the amended petition and answer to the amended petition, which denied the material allegations of said amended petition (R. 43a). Thereafter the Referee handed down a memorandum decision in which the Referee accepted the figure of $197,785.05 as representing the cost of the merchandise on hand on January 1, 1939, and the contention of the Trustee that the merchandise sold during the period January 1, 1939, to September 28, 1939, was sold at not less than cost in the sum of $322,587.36. This contention of the Trustee was accepted by the Referee by reason of Section 21-L of the Bankruptcy Act, upon the theory that the missing books and records were necessary to determine the cost of the merchandise sold by the Union Fabrics, Inc. during the period from January 1 to September 28, 1939, were not made available to the Trustee in Bankruptcy (R. 20a). Under the original petition, which the Trustee abandoned, the missing records may have been necessary for the Trustee's purposes but by the amendment of the petition to provide for the opening figure as of January 1, 1939, it is the petitioner's contention that the missing records were not necessary and that the Trustee had in his possession, at the time of these proceedings, all of the books and records from which the cost of the sales during the period January 1, 1939, to September 28, 1939, could be ascertained.

Testimony was introduced on behalf of petitioner that the Union Fabrics, Inc. was a corporation formed in 1937 and was in the business of converting rayon and silk fabrics with offices in the City of New York. Said corporation had previously taken over the assets and liabilities of a corporation known as Union Silk Mills, Inc., which was jointly controlled by Abraham Jeskowitz and Louis Berkman. The formation of the new corporation was due to the withdrawal of Louis Berkman and the sale of his stock to Abraham Jeskowitz, who took over the entire assets of the Union Silk Mills, Inc. at a price arrived at through an agreement between the parties (R. 25). Abraham Jeskowitz continued the business as sole owner and manager with the same inventory, assets, liabilities and records, and continued in business until September, 1939. In September, 1939, the Union Fabrics, Inc., was forced to make an assignment for the benefit of the creditors because of the financial condition of the business. Arbaham Jeskowitz and his witnesses offered testimony to the effect that no piece goods of any kind was ever withdrawn from the corporation except in the regular course of business and that entries in connection with all sales had been made in the books and records of the Union Fabrics, Inc., and that Abraham Jeskowitz had made no withdrawals from the Union Fabrics, Inc., except in the regular course of business and only withdrew such moneys as he was entitled to and for which a record was duly made (R. 61 to 64, 70 to 74). The Union Fabrics, Inc. used, in the main, the same type of bookkeeping as was used by its predecessor corporation and carried forward the identical perpetual inventory used by the Union Silk Mills, Inc. for a period of five years prior to the incorporation of the bankrupt firm. This inventory book was continued where the old corporation left off with its many errors and omissions. These perpetual inventory books were used as a basis for arriving at one of the trustee's theories in his petition for the turnover (R. 35A). The Referee however accepted

the figure of $194,785.05 as representing the cost of the merchandise on hand on January 1, 1939, even though evidence was offered to show that there were many errors and omissions totaling approximately 113,000 yards of merchandise in the inventory record. The Referee applied Section 21-L of the Bankruptcy Act and considered the merchandise sold during the period January 1, 1939 to September 28, 1939, at not less than cost even though the trustee had on hand the sales book, the perpetual inventory book and the dye book as well as the purchase invoices for the years 1939 and 1938. The sales book contains an original duplicate copy of the bill given or sent to customers showing in detail the information as to when the merchandise was sold identifying the merchandise by the Union Fabrics, Inc., quality number, Union Fabrics, Inc. piece goods number, the yardage sold and the sales price. The perpetual inventory books contained the accounts of the piece goods bought and indexed by the Union Fabrics, Inc. and quality number, the mill greige goods number, dye lot number and quantity received and the quantity shipped. The dye book contains the following information: The name of the dyer, date returned from the dyer, name of the greige goods mill, greige goods quantity number, mill number, yardage sent to dyer and the finished yardage returned by the dyer. This book also indicates the shrinkage, if any, in the dye goods. It is petitioner's contention that from these records the Trustee's accountants could have ascertained the cost price of the merchandise sold. The trustee's accountant did not ascertain the cost price of the merchandise sold upon the theory that the journal for 1938, general ledger for 1937 and purchase invoices for 1937 and inventory sheets, as distinguished from the inventory book, were not available. The Referee, by accepting the testimony of the Trustee's accountant that the books from which the cost price of the merchandise sold could be ascertained were not available, applied Section 21-L of the Bankruptcy Act and placed the burden upon Abraham Jeskowitz to

establish exactly the cost of the merchandise sold during the period. Abraham Jeskowitz, who did not have moneys to retain a lawyer during the greater portion of these proceedings and conducted his own defense to the proceeding, did not have the moneys and could not retain an accountant to ascertain the cost and therefore could not offer testimony in that respect. Because Abraham Jeskowitz was unable to hire an accountant to refute the testimony of the Trustee's accountant in order to show that the books which were in the Trustee's possession were sufficient to establish cost, he was unable to show the Referee, by expert testimony of an accountant, that the Trustee did have in his possession books and records from which the cost price of the merchandise sold could be ascertained and to establish the cost of such merchandise.

The Referee therefore found that Abraham Jeskowitz did not meet the burden of proof which was shifted to him under Section 21-L of the Bankruptcy Act and made the turnover order based upon a finding that Abraham Jeskowitz had in his possession merchandise of the value of $69,921.24. This was not a finding of an actual withholding but rather a theoretical one based only upon the mathematical computations advised by the Trustee's accountant. Testimony was introduced on behalf of Abraham Jeskowitz that he never removed any property of any kind from the Union Fabrics, Inc.; that he had not withdrawn any moneys from the Union Fabrics, Inc. except in the regular course of business and except as was entered in the books and records of account; and that he did not have, either on September 28, 1939 or at any time during the turnover proceedings, any portion of the said sum of $69,924.21. The Trustee in its petition did not rely upon actual proof of possession by Abraham Jeskowitz of the sum of $69,924.21 but upon a presumption that if the moneys were unaccounted for as of September 28, 1939, then he continued forever to have possession of that money. The Referee adopted the Trustee's theory of a presumption of continued possession and without actual proof of present pos-

session rendered a decision finding present possession of the moneys in question although petitioner had testified that he never had any part or portion thereof. An order in conformity with the Referee's decision was entered on February 23, 1943.

A petition to review the said order of the Referee was filed by petitioner (R. 12a). The Referee's order was affirmed by order of the District Court on May 6, 1943 (R. 52). A notice of appeal was filed in the Circuit Court of Appeals (R. 4a). The Circuit Court of Appeals rendered a decision in which a main and concurring opinion were written (R. 79a). Circuit Judge Frank, in the concurring opinion, stated in substance that he hoped that the Supreme Court of the United States would review the question of whether a Trustee in Bankruptcy in a turnover proceeding should be allowed to rely upon a presumption of continued possession of the property and overrule precedents which fasten upon the courts an irrational rule of presumptions which are obviously contrary to the facts (R. 84a).

Reasons Relied On for the Allowance of the Writ

The lower courts erred, as a matter of law, in relying upon a presumption rather than upon clear and convincing proof, in finding that a theoretical shortage existed as of September 28, 1939.

The courts below erred, as a matter of law, in failing to hold that the Trustee was required to submit affirmative proof that the petitioner had in his possession and under his control on September 28, 1939, merchandise valued at $69,921.24, or the equivalent in cash.

The courts below erred, as a matter of law, in relying upon the presumption of continued possession, in spite of the testimony offered to refute any theoretical withholding of property, and to refute the presumption that he continued to have any property in his possession or under his control.

The decisions of *Danish* v. *Sofranski,* 93 F. (2d) 424; *In re Schoenberg,* 70 F. (2d) 321; *In re Pinsky-Lapin & Co.,* 98 F. (2d) 776; *Seligson* v. *Goldsmith,* 128 F. (2d) 977; *Robbins* v. *Gottbetter,* 134 F. (2d) 843, all decided by the Circuit Court of Appeals for the Second Circuit, and involving the question of when a trustee may rely upon a presumption of continued possession, as in the case at bar, are conflicting in doctrines of law.

The recent decisions of the Circuit Court of Appeals for the Second Circuit in substance suggest that the presumption of continued possession, which they feel constrained to follow, constitutes an abuse of process of the Bankruptcy Court, and that the Supreme Court of the United States should consider, determine the question and change the law so as to do away with the presumption of continued possession.

The recent decisions of the Circuit Court of Appeals, in which they rely upon a presumption of continued possession, are in conflict with the decisions of the Circuit Court of Appeals of the Seventh Circuit. *In re J. L. Marks & Co.,* 85 F. (2d) the decision of the Circuit Court of Appeals for the Fifth Circuit, *Samel, et al.* v. *Dodd,* 142 Fed. 68, Circuit Court of Appeals for the Eighth Circuit, and *Marin* v. *Ellis,* 15 F. (2d) 321.

The Referee and the District Court erred in making an order which operates *in personam,* by requiring petitioner to do the thing commanded upon pain of punishment by imprisonment for refusal, without having required the Trustee to affirmatively prove, particularly in view of the lapse of three years and four months, that the petitioner had the money in his possession or under his control at the time of the order and the power to comply with its requirements.

The questions involved should be settled by this Court, so that there may be a unanimity of opinion throughout the courts of the United States.

The questions involved should be settled by this Court, because the Circuit Court has expressed an opinion that the application of a continued presumption constitutes an abuse of process of the Bankruptcy Court.

The question involved should be settled by this Court because judges of the Circuit Court have expressed the desirability of the determination of this question by the Supreme Court of the United States, and is in effect a request to the Supreme Court that they determine that question.

Specifications of Error to be Advanced

The District Court and the Referee erred

1. In holding that the provisions of Section 21-L of the Bankruptcy Act were applicable to the facts in the case at bar.

2. In holding that the missing records were required to enable the Trustee's accountant to establish the cost of the merchandise sold between January 1, 1939 and September 28, 1939.

3. In finding a theoretical shortage upon the computation by the Trustee's accountants, where the proof submitted by the Trustee in support of the accountant's computations was not clear and convincing as required by law.

4. In failing to accept the testimony offered on behalf of the petitioner to show that the computations of the Trustee's accountants were erroneous and contrary to the facts.

5. In failing to find that the burden was upon the Trustee to establish by actual proof how much money or property petitioner had in his possession on September 28, 1939.

6. In holding that the Trustee may rely upon a presumption of continued possession over a period of almost three

and a half years in the case of a theoretical withholding of property.

7. In holding that the Trustee was not required to prove how much of the money still remained in the possession of the petitioner as an issue separate and apart from the original turnover, where almost three and a half years elapsed between the making of the assignment for the benefit of creditors and the turnover order by the Referee on February 23, 1943.

Summary of Argument

POINT A

There is a conflict of authority within the Circuit Court of Appeals for the Second Circuit on the question of when a trustee may rely on a presumption of continued possession resulting in the suggestion by the Circuit Court of Appeals for the Second Circuit, in its recent decisions, that this question be reviewed and finally determined by the Supreme Court of the United States.

POINT B

There is a conflict of authority on the question of presumption of continued possession among several circuits on the question of law involved in the case at bar, and there should be a unanimity of opinion among the various circuits with regard to this question.

POINT C

The Trustee did not offer any proof to show that petitioner had, at the date of the turnover order, any property of the bankrupt, although the law requires that the Trustee establish all the elements of a turnover proceeding by clear and convincing proof.

Argument

POINT A

There is a conflict of authority within the Circuit Court of Appeals for the Second Circuit on the question of when a trustee may rely on a presumption of continued possession resulting in the suggestion by the Circuit Court of Appeals for the Second Circuit, in its recent decisions, that this question be reviewed and finally determined by the Supreme Court of the United States.

One of the determining issues in the case at bar is whether the Trustee should have been permitted to rely upon the presumption of continued possession for a period of approximately three years and four months under the circumstances of the case.

The Trustee did not rely upon an actual withholding of property, but only upon a theoretical withholding of property. The Trustee adopted a figure representing the opening inventory from a financial statement given by the bankrupt, although the petitioner offered proof during the course of the turnover proceeding to the effect that the inventory books by reason of errors and omissions overstated the extent of the inventory by approximately 113,000 yards. The Referee applied Section 21-L of the Bankruptcy Act in arriving at the amount unaccounted for by petitioner.

Section 21-L of the Bankruptcy Act provides that where the books or records from which the cost of sales are not made available to the Trustee in Bankruptcy, the Trustee may rely upon the presumption that the sales price is not less than the cost of the merchandise sold. Petitioner contends that there are in evidence books and records from which the cost price of the merchandise sold could have been

ascertained by the accountants for the Trustee in Bankruptcy. As a result of this presumption and acceptance of the opening inventory figure, the Referee arrived at the amount of $69,921.24 representing merchandise allegedly unaccounted for by the bankrupt, Union Fabrics, Inc.

Testimony was offered on behalf of the petitioner to the effect that he did not have any money or property of any kind, nature or description, did not have enough for living expenses, nor enough to retain an attorney or accountants to properly defend him in connection with the turnover proceedings, and in spite of that the Referee, in granting the turnover order, relied upon a presumption in law that the petitioner continued to have possession of the property for approximately three years and four months.

Circuit Judge Frank, who wrote a concurring opinion in the case at bar, stated as follows:

> "I concur but with the hope, expressed by Judge Learned Hand in Robbins v. Gottbetter, 2 Cir., 134 F. 2d 843, 844, and Seligson v. Goldsmith, 2 Cir., 128 F. 2d 977, 978, 979, that the Supreme Court will soon grant certiorari in some such case as this and overrule precedents that fasten upon us what seems to him and me an irrational rule of presumption, obviously contrary to fact, which enables trustees in bankruptcy to employ civil actions as substitutes for criminal proceedings."

In *Seligson* v. *Goldsmith,* 128 F. (2d) 977 (C. C. A., 2nd Cir.), an appeal was taken from an order of the District Court which confirmed a Referee's order directing the respondent to deliver to the Trustee merchandise, or in place, its value, in the sum of $1,812.50. There was absolute proof that the merchandise was in possession of the bankrupt not later than January, 1939. The adjudication in bankruptcy was on June 22, 1939, and the order of the Referee was entered on October 21, 1941. This is a period of two years and ten months. Circuit Judge Learned Hand, who wrote the unanimous opinion of the Court,

discussed the question of a continued presumption at great length, and stated in part as follows, at page 978, referring to continued presumption:

> "* * * we cannot conceive how anyone can believe that it is 'supported' by that 'clear and convincing evidence' which must exist to satisfy the test laid down in Oriel v. Russell, supra, 278 U. S. 258, 362, 49 Sup. Ct. 173, 174, 73-1 Ed. 419."

Circuit Judge Hand considered the presumption of continued possession as unsuitable, and at page 979 stated as follows:

> "However desirable that consummation may be, this fact makes the presumption unsuitable for its only proper purpose of eliciting the facts on whose existence the relief hangs; facts which in this situation the Courts know and every one else knows not to exist."

Circuit Judge Learned Hand states, in effect, that were it not for precedents of his court, he would not rely upon a presumption of continued possession such as was done in the case at bar, and at page 979 states as follows:

> "For these reasons, were the matter now before us as *res integra*, we should reverse the order. It would not disturb us that without the presumption such proceedings would generally fail, * * *."

Circuit Judge Hand, in analyzing the situation, finds that the Courts do not have to rely upon a presumption of continued possession because other relief is available, and at page 979 further states as follows:

> "Even if the absence of any other relief were ever an excuse for perverting the legal proceedings from their avowed purpose, or for basing relief upon facts which cannot be known, other relief is here in fact available, for those offenders are extremely vulnerable and can ordinarily be successfully prosecuted, as every judge of experience knows."

Circuit Judge Learned Hand, in his opinion, takes the view that even if other relief were not available, the continuance of the Courts to rely upon a presumption of possession in turnover proceedings, would be an abuse of its processes, which would discredit the Courts generally and impair its integrity, and further states at page 979 as follows:

> "And though that were not so, it would be at too high a cost that the law should proceed in the face of basic ignorance which it dares not aver and must cover by a transparent eviction; such an abuse of its processes discredits it generally and impairs its integrity, which in the end depends upon an unswerving allegiance to the truth so far as truth is accessible."

Under these circumstances, Circuit Judge Learned Hand expresses the considered opinion that the Supreme Court, which has never committed itself to the presumption, should finally determine the question, and at page 979 states as follows:

> "The Supreme Court has never committed itself to the presumption, and perhaps at some time may think it desirable finally to determine the question."

In the case at bar we even have a more serious situation in connection with lack of actual proof on the part of the Trustee, because the Referee relied on a presumption given to him by Section 21-L as to the cost price of the merchandise sold, and then relied on a presumption of continued possession. It is a well-known maxim in the law that a presumption should not be based upon a presumption, as was done in the case at bar, or one inference drawn from another.

Robbins v. *Gottbetter,* 134 F. (2d) 843, involved a turnover order in the sum of $2,500 found to have been withdrawn by the bankrupt during a period of three months before November, 1940. The Referee's order for the turnover was made in April, 1942, about eighteen months later.

Here, as in the case of *Seligson* v. *Goldsmith,* cited supra, the majority opinion of the Circuit Court expresses the view again that they were following the earlier decisions against their own better judgment, and at page 844 stated as follows:

> "The whole proceeding is, to the minds of us two, an abuse of the process of the Bankruptcy Court; but, until the Supreme Court, which has never really considered the matter, sees fit to change the law as it has been settled, we regard ourselves as concluded."

In earlier decisions, however, the Circuit Court of Appeals for the Second Circuit refused to accept the principle that the trustee is entitled to proceed to a turnover order on the theory of presumption of continued possession.

In re Danish v. *Sofranski,* the Circuit Court of Appeals for the Second Circuit, in an opinion written by Circuit Judge Learned Hand, handed down on December 13, 1937, and reported in 93 F. (2d) 424, stated as follows:

> "However, the trustee was obliged to prove not only that the respondents had wrongfully abstracted this money, but how much of it they had in their hands when the referee's order passed, at least his first order of March 2, 1937. In re Schlesinger (C. C. A. 2nd Cir.), 4 Am. B. R. 361, 102 F. 118; Sinsheimer v. Simonson (C. C. A. 6th Cir.), 5 Am. B. R. 537, 107 F. 898, 907; In re Holden (C. C. A. 6th Cir.), 29 Am. B. R. 387, 203 F. 229, 233; In re Redbord (C. C. A. 2nd Cir.), 5 Am. B. R. (N. S.) 357, 3 F. (2d) 793."

Circuit Judge Learned Hand discussed the extent of proof that the Trustee must offer to sustain a turnover order and made a clear distinction between the amount of proof necessary in connection with a turnover for chattels, where it is enough to show that they were secreted, and a turnover for money, or goods, which could be dissipated. With regard to money or goods which could be dissipated, Circuit Judge Learned Hand stated as follows:

> "But when the respondent acknowledges receiving the property, and it is of a kind that he would be likely to dissipate—money or saleable goods—there is no reason why the trustee should not prove how much remains within the respondent's control. In such cases the trustee must make out his case upon this issue just as he must upon the original taking. In re Schoenberg (C. C. A. 2nd Cir.), 25 Am. B. R. (N. S.) 262, 70 F. (2d) 321; In re J. L. Marks & Co. (C. C. A. 7th Cir.), 32 Am. B. R. (N. S.) 57, 85 F (2d) 392."

In re Schoenberg, 70 F. (2d) 321, cited by Judge Learned Hand, is a decision of the Circuit Court of Appeals for the Second Circuit, and in that case, at page 323, it is stated as follows:

> "But the turnover order cannot stand. A turnover order presupposes that the person against whom it is directed has possession of the property or money which he is directed to deliver up. In re Redbord, 3 F. (2d) 793, 794 (C. C. A. 2). In the case at bar the trustee made no attempt to show what part of the merchandise originally transferred was still on hand or that the appellant had the sum of money which in the alternative it was directed to pay over."

Later, in the *Matter of Pinsky-Lapin & Co.,* 98 F. (2d) 776, the Circuit Court of Appeals for the Second Circuit in a divided decision overruled the principle of law laid down in *Danish* v. *Sofranski,* cited supra.

Circuit Judge Learned Hand, in a dissenting opinion, in *In Re Pinsky-Lapin,* at page 781, stated:

> "I cannot see how our decision in Danish v. Sofranski, 2 Cir., 93 F. (2d) 424, is material here; any comment upon it is inevitably obiter. But since my brothers think it desirable to overrule it, I wish to dissent pro tanto. That case was very deliberately considered, and the doctrine was not laid down by chance; in our judgment we were only following In re Schoenberg, 2 Cir., 70 F. (2d) 321, the doctrine of which we believed, as I still believe, was right."

The view taken by Circuit Judge Learned Hand and recently concurred in by Circuit Judge Jerome N. Frank, in the case at bar, and by Circuit Judge Swan in the case of *Seligson* v. *Goldsmith,* supra, appears to be supported by the principle of law laid down in the case of *Oriel* v. *Russell,* 278 U. S. 358, where the Supreme Court of the United States held that a proceeding for a turnover order requires clear and convincing evidence of the justice of such order before it is made.

There is, undoubtedly, a disagreement among the judges of the United States Circuit Court of Appeals for the Second Circuit on the question of the continuation of the use of the principle of presumption of continued possession as applied to turnover proceedings.

It is the considered opinion of Circuit Judge Learned Hand and some of his colleagues that the Supreme Court should consider this question and determine it finally, and upon such determination should establish a principle of law that the trustee prove the extent of the property which remains in the hands of the respondent in such turnover proceedings at the time that the turnover order is made instead of relying upon a presumption of continued possession.

POINT B

There is a conflict of authority on the question of presumption of continued possession among several circuits on the question of law involved in the case at bar, and there should be a unanimity of opinion among the various circuits with regard to this question.

Where there is a conflict of authority among the several circuits on a question of law which involves the liberty of the individual, especially in a case where a man can be coerced by indefinite imprisonment to do what it is uncertain that he can do at all, such question should be finally and definitely settled by the Supreme Court of the United States.

It must be recognized that in all human affairs some doubts must enter, but when the stake is liberty, we should make sure that we are applying principles of law which have been upheld by the Supreme Court of the United States and not those around which grave doubts exist, as in the case at bar.

The Circuit Court of Appeals for the Second Circuit has, in a number of decisions, relied upon the presumption of continued possession. *In re Pinsky-Lapin & Co.*, cited supra, *In re H. Magen Co.*, 10 F. (2d) 91, *Steinreich Associates, Inc.*, 83 F. (2d) 254.

The Eighth Circuit holds a contrary view to that of the Second Circuit. In *Marrin* v. *Ellis* (C. C. A. 8), 15 F. (2d) 321, the bankrupt was adjudged as such on December 22, 1922. The turnover order was made by the Referee on April 27, 1925. A period of 28 months elapsed. The Circuit Court, in affirming the orders of the courts below, stated at page 321:

> "The legal presumption is that a bankrupt, who at the time of his adjudication in bankruptcy has and unlawfully holds back from his trustee in bankruptcy a part of his property, or of its proceeds, continues to hold it or them, *but this presumption grows weaker as time passes, until it finally ceases to exist.*" (Italics writer's.)

It appears from the foregoing that where 27 months were involved between the date of the bankruptcy and the date of the turnover order, the Circuit Court for the Eighth Circuit refused to grant a turnover on the theory of a presumption of continued possession.

In *In re J. L. Marks*, 85 F. (2d) 392 (Circuit Court of Appeals 7th Circuit), the Circuit Court, in a similar case, in reversing an order of the court below, at page 393, stated as follows:

> "We assume for the purpose of the argument that the appellant Marks individually received the $6,500.00.

We are not, however, satisfied that the evidence is sufficient to support a finding that he possessed the money either at the time the bankruptcy proceedings were instituted or when the order to turn over the money was entered. We therefore conclude that the order was erroneously entered. Oriel v. Russell, 278 U. S. 358, 49 S. Ct. 173, 73 L. Ed. 419."

In *In re Samel* v. *Dodd* (C. C. A. 5), 142 Fed. 68, the Circuit Court, at page 73, stated:

"The bankrupts, in their answers, have sworn that they have not in their possession or under their control the money or goods involved in this proceeding. It seems to me that any evidence that conclusively showed they presently had in possession and control either the money or the goods would necessarily show where the same was kept or deposited, so that it could be reached by the process of the bankruptcy court, or of some court in a suit by the trustee. But, however that may be, the record in this cause, taken as a whole, fails to show that the bankrupts had in their possession at the date of the order committing them for contempt either the money or the goods referred to. If the bankrupts have sworn falsely in their pleadings or on their examination—and this proceeding is based solely on that hypothesis—the law provides for their punishment on indictment and conviction by a procedure which secures to them the right of trial by jury with all its constitutional safeguards."

This latter case entirely follows the reasoning of the Circuit Judge of the Second Circuit, as expressed in the concurring opinion of Circuit Judge Frank in the case at bar, and in the opinion of Circuit Judge Learned Hand in the case of *Seligson* v. *Goldsmith*, supra, and the case of *Robbins* v. *Gottbetter*, supra.

Aside from the conflict of authority and the suggestion made by the judges of the Circuit Court of Appeals for the Second Circuit that the question should be determined, there is still an additional and more important reason why this question should be determined. To imprison one for not doing what he cannot do, is inconsistent with the prin-

ciples of individual liberty. There is no statute or law which confers such authority. Imprisonment, under such circumstances, for failure to pay money, where it has not been proved by clear and convincing evidence that that person has money, is unwarranted by law in a jurisdiction where imprisonment for debt is forbidden.

Where the person has the power to comply with the order, having the money or thing in question in his possession, he may, of course, be punished for his failure to surrender it without a conflict of any rule of law against imprisonment for debt, but such imprisonment should not be based upon a presumption, but must be established upon facts.

POINT C

The Trustee did not offer any proof to show that petitioner had, at the date of the turnover order, any property of the bankrupt, although the law requires that the Trustee establish all the elements of a turnover proceeding by clear and convincing proof.

The Referee in the case at bar reached his conclusion by the presumption allowed by law under Section 21-L, and also by a presumption of continued possession of the property found to have been unaccounted for as of September 28, 1939.

All courts have recognized that motions for turnover orders are serious proceedings. They are serious for the Trustee because he is entitled to property which belongs to the estate. They are much more serious to the respondent because if there is a failure of that clear evidence referred to by Chief Justice Taft in *Oriel* v. *Russell*, 278 U. S. 358, 49 S. Ct. 173, pointing to them as possessors of the property in question, they may be involved in the predicament of having to go to jail for not doing something that they cannot possibly do.

In *Boyd* v. *Glucklich,* 116 F. 131, 140, the Court stated:

> "The referee's conclusion seems to have been reached mainly, if not altogether, by approximate estimates, inferences, and conjectures, which, while they give rise to very strong suspicion, fall short of direct and conclusive proofs. The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass."

The Trustee should not be relieved of the burden placed upon him to prove by affirmative evidence that petitioner had failed to account for the merchandise or its proceeds alleged to be in the sum of $69,921.24, and how much remained at the date of the making of the turnover order.

In *Epstein* v. *Steinfeld* (C. C. A. 3), 210 Fed. 236, 239 (cited with approval in *Oriel* v. *Russell,* 278 U. S. 358, 49 Sup. Ct. 173, 73 L. Ed. 419), the Court said:

> "The second stage is to determine whether or not the property required is still in the possession or control of the bankrupt and that he is physically able to deliver it to his trustee."

In the case at bar no testimony was offered by the Trustee in compliance with what is termed "the second stage" of a turnover proceeding. The Trustee merely relied upon the presumption of continued possession.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that an important question of Federal law may be settled, as hereinabove discussed, and that to such end a writ of certiorari be granted and this Court review the decision of the Courts below and finally reverse it.

ARCHIBALD PALMER,
Counsel for Petitioner.